STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 24, 2007
v	No. 267475 Kent Circuit Court
NAKAJABU SEPHOLA SIMS, Defendant-Appellant.	LC No. 05-006113-FC

Before: Kelly, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of aiding and abetting, MCL 767.39, armed robbery, MCL 750.529. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to 7 to 20 years' imprisonment. We reverse and remand for a new trial.

On May 28, 2005, Antoine Hodges committed an armed robbery at a Marathon gas station located in Bryon Township. Immediately after the robbery, he entered the passenger side of a van that was parked on a highway entrance ramp. Defendant drove the van. After driving away from the gas station, the police stopped defendant and Hodges fled, but was later apprehended. When the police told defendant about the armed robbery, "he seemed surprised at that and stated that he was dropping his friend off at the bathroom down at the gas station."

Defendant was charged with aiding and abetting the commission of the armed robbery. On September 8, 2005, he intended to plead guilty to armed robbery. In exchange, the prosecutor agreed to dismiss the habitual offender charge, and to recommend a minimum sentence of five years in prison. Because defendant testified that he did not know about the robbery before, or immediately after it occurred, the trial court rejected defendant's guilty plea and ordered a trial. The court explained:

> That's not – that's not aiding and abetting an armed robbery. I tell every jury that we have an aiding and abetting that you have to have intended for the crime that's at issue to occur. If he didn't know and all he had was a generic intent for a crime to occur, it could have been a misdemeanor, a felony. It's not aiding and abetting an armed robbery.

At trial, defendant maintained that he did not know that Hodges was going to rob the gas station. Defendant testified that Hodges did not have a driver's license and that, in the past,

Hodges had paid defendant to drive him around to pick up marijuana. When Hodges called defendant on May 28, 2005, and asked him if he wanted to make "a couple bucks," defendant assumed that Hodges wanted to go and pick up drugs. Defendant agreed to drive Hodges because he needed money. Defendant testified that Hodges told him to turn onto the highway, and "pull over real quick," which he did. Defendant further testified that Hodges "never really said what he was gonna do" but defendant "figured [they] probably was gonna do somethin' with some drugs or somethin' from the get-go." After the armed robbery, Hodges showed defendant the money. Defendant thought that Hodges could have taken the money from a truck that was parked at the gas station; he did not think that Hodges committed an armed robbery. He told Hodges "Man I'm gonna drop you off . . . [w]e can't ride around like this." Defendant also testified that he never saw Hodges with a knife. Nevertheless, the jury found defendant guilty of armed robbery.

Defendant first contends that the trial court erred in rejecting his guilty plea. We review a trial court's decision to accept or reject a guilty plea for an abuse of discretion. *People v Grove*, 455 Mich 439, 444; 566 NW2d 547 (1997). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "'In reviewing the adequacy of the factual basis for a plea, this Court examines whether the factfinder could properly convict on the facts elicited from the defendant at the plea proceeding.'" *People v Adkins*, 272 Mich App 37, 38; 724 NW2d 710 (2006), quoting *People v Hogan*, 225 Mich App 431, 433; 571 NW2d 737 (1997). However, "'[w]hether conduct falls within the statutory scope of a criminal statute is a question of law that is reviewed de novo on appeal.'" *Id.* at 39, quoting *People v Rutledge*, 250 Mich App 1, 4; 645 NW2d 333 (2002).

A trial court may not accept a plea of guilty unless it is convinced that the plea is understanding, voluntary, and accurate. MCR 6.302(A); *People v Thew*, 201 Mich App 78, 82; 506 NW2d 547 (1993). "Before accepting a guilty plea, a trial court must question the defendant to ascertain whether there is support for a finding that the defendant is guilty of the offense to which he is pleading guilty." *People v Watkins*, 468 Mich 233, 238; 661 NW2d 553 (2003). See MCR 6.302(D)(1).

The elements of armed robbery are (1) an assault and (2) a felonious taking of property from the victim's person or presence while (3) the defendant is armed with a dangerous weapon. MCL 750.529; *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). In this case, it is undisputed that Hodges committed the armed robbery. Defendant, was charged under an aiding and abetting theory. MCL 767.39 provides that "[e]very person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense."

> "To support a finding that a defendant aided and abetted a crime, the prosecutor must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement." [*Carines, supra* at 757-758 (citation omitted).]

"Armed robbery is a specific intent crime for which the prosecutor must establish that the defendant intended to permanently deprive the owner of property." *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). This Court has consistently held that "aiders and abettors can be liable for specific intent crimes if they possess the specific intent required of the principal or if they know that the principal has that intent." *Id.* at 431. Thus, if defendant had the specific intent to commit the armed robbery or knew that Hodges intended to commit the armed robbery, defendant could be liable for the armed robbery under an aiding and abetting theory. *People v Robinson*, 475 Mich 1, 14-15, 15 n 39; 715 NW2d 44 (2006). None of the testimony elicited at defendant's plea proceeding supported that defendant intended the commission of the armed robbery. Moreover, the testimony did not support the conclusion that defendant "participated while knowing that the principal had the requisite intent." *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992). Cf. *People v Anthony*, 33 Mich App 344; 189 NW2d 803 (1971). In fact, defendant testified that he had no knowledge that Hodges was going to commit the armed robbery. Instead, he testified that it was his belief that Hodges wanted to pick up marijuana. Although an aider and abetter of a crime is liable for the crime he or she "intends to aid or abet as well as the natural and probable consequences of that crime," *Robinson, supra* at 14-15, armed robbery is not the natural and probable consequence of aiding and abetting the procurement of marijuana. Consequently, based on defendant's testimony at the plea proceeding, there was an insufficient factual basis to support a finding that defendant was guilty of aiding and abetting the armed robbery. The trial court did not abuse its discretion when it determined to reject the plea agreement and order a trial. See MCL 768.35.

Defendant next contends that the trial court erred in instructing the jury at trial regarding the crime of aiding and abetting an armed robbery and that this error warrants a new trial. We agree.

This Court reviews claims of instructional error de novo. *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003).

> In reviewing claims of error in jury instructions, we examine the instructions in their entirety. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). "Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Aldrich, supra*. [*Id.*]

The requirements of the aiding and abetting statute, MCL 767.39, are a question of law that this Court reviews de novo. *Robinson, supra* at 5.

"A criminal defendant has the right to have a properly instructed jury consider the evidence against him." *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000), quoting *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909 (1995) (internal citation omitted). Accordingly, "[j]ury instructions must clearly present the case and the applicable law to the jury." *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). "[W]hen a jury instruction is requested on any theories or defenses and is supported by evidence, it must be given to the jury by the trial judge." *Rodriguez, supra* at 472 (citations omitted).

At trial, defendant requested the standard criminal jury instruction regarding aiding and abetting, CJI2d 8.1, which this Court has determined is a "clear and proper" statement of the law. See *People v Champion*, 97 Mich App 25, 32; 293 NW2d 715 (1980), rev'd on other grounds 411 Mich 468 (1981). The trial court denied defendant's request for CJI2d 8.1 and instructed the jury as follows:

> What needs to be proven to convict a person of aiding and abetting is simply that somebody committed another crime, in this case, an armed robbery. In this case it has to be proven that somebody robbed Mr. Rabideau. Frankly, there's no dispute in this particular case on the part of anybody here, that somebody did. In fact, it's even been acknowledged who that somebody was, that Mr. Hodges—Mr. Antoine Hodges, did rob Mr. Rabideau at knife-point. As I said, that's not in dispute.
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> The second thing which has to be proven is that Mr. Sims knew before Mr. Hodges carried out the armed robbery, that he, Mr. Hodges, was going to commit a crime. It need not be proven that Mr. Sims knew that Mr. Hodges was going to commit an armed robbery, that he was gonna rob a particular place or a particular person. It's not even necessary that it be proven that Mr. Sims knew that a robbery, as opposed to some other crime, was going to be committed.
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> What has to be proven is that Mr. Sims knew that Mr. Hodges was gonna commit a crime, even if he did not know what crime Mr. Hodges was gonna commit, so long as the crime that Mr. Hodges ultimately committed, whatever that crime was, was not outside the scope of the kinds of things that Mr. Sims knew might be afoot. He doesn't have to know exactly what it was. But, it can't be something, you know, way out in left field entirely different than anything that he thought might be happening.
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> The bottom line, like I said, is what has to be proven is that he knew a crime was going to occur, but not a particular crime—not a particular kind of crime, robbery versus something else; and, not of a particular person, a particular place, or anything of that sort.
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> Now the third thing that the evidence has to establish here is that Mr. Sims intended to further, or assist, or help in some way with the commission of the crime that Mr. Hodges was gonna do. Remember, he's got to know that he's gonna commit a crime. But, because he doesn't have to know exactly what the crime is, he doesn't have to mean to help with a particular crime.
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> Simply, if he knows that someone else is going to commit a crime, then he simply has to intend to help him commit that crime, whatever it is, even though he really doesn't know what it is.
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> * * *

> So, if Mr. Sims knew before Mr. Hodges actually robbed Mr. Rabideau, that was what Mr. Hodges intended to do was commit a crime of some sort, which could have included a robbery, even though he didn't know exactly what was afoot, any help that he deliberately gave to Mr. Hodges to assist with that crime, before it was over with, makes him an aider and abettor.
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> If he didn't have any idea that any kind of crime was gonna happen, or that whatever he did was not intended to help out or didn't help out in the least, then he's not guilty of being an aider and abettor.

Defendant objected to the instruction, arguing that, under "[CJI2d] 8.1, the intent required is different than the intent instructed by the Court." Defense counsel also argued that the jury instruction was contrary to the interpretation of the aiding and abetting statute that the trial court recited at the plea proceedings. Defense counsel indicated that he relied upon that interpretation in presenting the defense that, although defendant believed that he and Hodges would be involved in a drug related, i.e., illegal, activity, defendant did not know about the armed robbery. Defense counsel argued that the trial court should not have instructed the jury differently than it instructed the parties at the plea proceeding. In response, the trial court stated that, at the plea proceeding, it "was incorrect" regarding the law of aiding and abetting, and that it was not "estopped" from correctly instructing the jury at trial.

During jury deliberations, the jurors requested that the trial court instruct them again on the elements of aiding and abetting. The trial court instructed them, in part, as follows:

> The second thing which has to be proven is that Mr. Sims knew that Mr. Hodges was gonna commit a crime. It doesn't have to be proven that Mr. Sims knew that Mr. Hodges was going to commit an armed robbery, just that he was gonna commit a crime, and an armed robbery, the crime that Mr. Hodges turns out to have committed, was not outside the scope or the anticipation of the kind of activity Mr. Sims, from whatever he knew, figured might occur.
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> Now, obviously, therefore, there's no requirement that Mr. Sims have known that a particular person was going to be the victim of a crime, or that it was gonna be in a certain situation. The only requirement is that he have known that Mr. Hodges was going to commit some kind of a crime, and that a robbery, in particular, an armed robbery, was just not way outside the scope of whatever he had reason to think might be going on. That's the second thing.
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> * * *
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> So Mr. Sims – it does not have to be proven here that what he meant to do was help a robbery. Remember, he doesn't have to have known that there was a robbery going on. He has to have known that there was a crime that was going on and that robbery fit within what might be occurring. As long as he meant to help Mr. Hodges commit whatever crime Mr. Hodges was gonna commit, even if he didn't know what that crime was, then the help he gives satisfies the fourth element.

Later, the jurors requested a copy of a statute or other documentation stating the elements of the crimes for which defendant was charged. In response, the trial court provided the jurors with written instructions, which reflected the court's earlier instructions. The jurors informed the trial court that they could not agree on a verdict; however, the trial court instructed them to resume deliberations. Approximately 30 minutes later, the jurors returned to the courtroom and asked the trial court whether "if . . . one or more of the jurors . . .concludes that what Mr. Sims knew about was an effort to get drugs, does that fall within the scope of an armed robbery?"

The trial court instructed the jurors to "wipe the[ir] mind[s] clean of this concept of 'scope'" because it was "incorrect" to use that word in the instructions. The trial court further stated:

> So, the law is simply – and I can't say it any simpler than this – that if Mr. Sims aided and abetted the armed robbery, which there isn't any dispute ultimately occurred, and if he knew that Mr. Hodges was going to commit a crime, and that he did something to help him before, during, or after, accomplish a crime, and that what he meant to do was help him accomplish a crime, you can't defend yourself by saying, "Well, I only knew of this, and that person kind of did something else, and therefore, my help, although it really helped him commit that crime, and I gave the help intentionally, it wasn't an accident that I gave it, isn't a crime, because he did something not exactly as I thought was gonna happen."
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> We talked about crossing the line. Once you make the decision to help somebody else commit a crime, you know they're gonna commit a crime, and you don't know what it is but – necessarily, but you help them commit a crime, and you do that deliberately, there are only two choices at this point. You are either guilty of nothing, even though you decided to help commit a crime, and you helped commit a crime; or, you are guilty of whatever your compatriot did. And, people are, for lack of a better term, stuck with the people they choose to do things with, and joint enterprises are the responsibility of people who participate in those joint enterprises.
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> So put aside this notion of within the scope, or outside the scope, or whatever else. I should have never used that word. I will never ever use it again, because I've seen the problems that it's creating. Simply ask yourself those questions with regard to aiding and abetting.

Thereafter, the jury found defendant guilty of armed robbery.

We recognize that "[t]he standard jury instructions do not have the official sanction of the Michigan Supreme Court and, consequently, adherence to their choice of language is not required." *People v Bono (On Remand)*, 249 Mich App 115, 123 n 6; 641 NW2d 278 (2002). However, unlike the standard jury instruction, the aiding and abetting jury instructions in this case were contrary to the applicable law. See *Carines*, *supra* at 757-758; *Robinson*, *supra* at 7-15. Under MCL 767.39, the correct test for aiding and abetting armed robbery is whether the defendant procures, counsels, aids, or abets in another committing an assault and a felonious taking of property from the victim's person or presence, while being armed with a dangerous weapon. MCL 750.529; *People v Moore*, 470 Mich 56, 70-71; 679 NW2d 41 (2004). The test is

not, as the trial court posited, whether defendant intended to procure, counsel, aid, or abet Hodges in committing *some* crime, *any* crime, and an armed robbery resulted.

To establish that defendant aided and abetted the commission of the armed robbery, the prosecution was required to prove beyond a reasonable doubt that "defendant intended the commission of *the crime* or had knowledge that the principal intended *its commission* at the time he gave aid and encouragement." *Carines, supra* at 757-758 (emphasis added). Based on the jury instructions provided by the trial court, the jury could find defendant guilty of aiding and abetting the armed robbery if he intended to participate in a drug related activity with Hodges, even if he had no knowledge of Hodges's intention to commit an armed robbery and there was no nexus between the intended illegal drug activity and the armed robbery. Such a result is inconsistent with controlling case law.

The trial court determined that *People v Wirth*, 87 Mich App 41; 273 NW2d 104 (1978) "plainly support[ed] the instruction that the Court gave." The trial court's reliance on *Wirth, supra*, was misplaced. In that case, the defendant pleaded nolo contendere to being an aider and abettor to the crime of extortion stemming from a plot to kidnap individuals and hold them for ransom. The defendant's role was to take the principals in the crime to the area of the individuals' home and later to pick them up when they called. For his part, the defendant received ten percent of the ransom. When the defendant dropped off the principals, he saw that they carried a rifle and a shotgun. The defendant said he knew the plan was to "score something big" but he had no idea as to what crime was intended. According to the defendant, he first learned of the kidnapping on the radio the next morning. *Id.* at 43-44.

On appeal, the defendant in *Wirth* questioned whether he could be convicted of extortion where he allegedly did not have the requisite specific intent. *Id.* at 46. This Court acknowledged that, in order to be "held criminally liable for a specific intent crime as an aider or abettor, a defendant must have had either the requisite specific intent or known that the actual perpetrator had the required intent." *Id.* Although the defendant denied knowing about the specifics of the offense, this Court concluded that there was ample evidence from which it could be inferred that the defendant had the requisite intent. The Court explained,

> It can be argued that defendant intended any and all consequences of the criminal undertaking. Defendant intended to partake in whatever crime was planned and he did not care what it was. He knew weapons were involved and this did not deter him. It could be concluded that defendant's intent encompassed all crimes, including extortion. By the same token, the scope of the criminal undertaking with which defendant knowingly associated himself would be unlimited. [*Id.* at 48-49.]

Hence, under *Wirth*, where a defendant agrees to aid and abet others in the commission of a crime without regard to the nature of the intended crime, the defendant's lack of knowledge concerning the specifics of the intended crime will be no defense. Rather, every crime is fairly within the scope of the criminal enterprise. Consequently, *Wirth* stands for the proposition that a defendant can intend to aid and abet the commission of any and all crimes committed by his accomplices. However, it does not stand for the proposition that a defendant's intent to aid and abet a specific crime renders the defendant guilty of aiding and abetting any crime actually committed.

The trial court's reliance on *People v Bargy*, 71 Mich App 609; 248 NW2d 636 (1976), was similarly misplaced. In *Bargy*, the defendant was convicted of first-degree murder as an aider and abettor. The defendant maintained that he and another man picked up a boy, who was hitchhiking. The other man and the boy allegedly were engaging in sexual activity when an argument ensued. The man produced a gun and killed the boy. *Id.* at 611-612. At trial, the judge instructed the jurors, in part, that

> One may not participate in a crime without being liable for the consequences. Where two or more persons combine to commit a felony and a murder is committed in furtherance thereof all parties to [the] agreement to commit [the] felony are liable for a murder although a homocide [sic] was not planned.' This is in relationship to the words accessory or accomplice. One who is associated with another in the commission of a crime, a criminal offense, is called in law an accomplice. Sometimes they are called an accessory." [*Id.* at 615-616.]

On appeal, this Court concluded that the trial court's instruction "was not sufficient to clearly apprise the jury of the task before it." *Id.* at 616. The Court explained:

> Because of this instruction, the jury could have been led to believe that if defendant aided and abetted the commission of a separate crime, in this instance engaging in sexual activities with a 15-year old boy, he was subject to liability for the resulting death. We cannot be sure the jury was not so confused. Where conflicting instructions are given, one erroneous and the other without error, it may be presumed that the jury followed the instruction that was erroneous. . . . For defendant to have been found guilty, the jury must have been able to find that a homicide was fairly within the scope of the common enterprise. We rule that a properly instructed jury, in this case, must determine whether the homicide was fairly within the scope of a common enterprise in which defendant participated or whether defendant was merely an accessory after the fact within the common law definition and punishable according to [MCL 750.505], a separate and distinct offense not necessarily included in the original charge. [*Id.* at 616-617 (citations omitted).]

In this case, the trial court's instructions clearly led the jury to believe that, as long as defendant intended to aid and abet the intended drug crime, he was subject to liability for the resulting armed robbery. Under *Bargy*, a properly instructed jury, however, needed to determine whether the armed robbery was fairly within the scope of the common enterprise in which defendant participated. *Id.* However, the jury was not instructed to make such a determination.

Arguably, the trial court's initial instructions to the jury, that the armed robbery had to be within the "scope" of the intended crime, was legally valid. See *Robinson, supra* at 14-15, in which our Supreme Court held that

> a defendant must possess the criminal intent to aid, abet, procure, or counsel the commission of an offense. A defendant is criminally liable for the offenses the defendant specifically intends to aid or abet, or has knowledge of, as well as those crimes that are the natural and probable consequences of the offense he intends to aid or abet. Therefore, the prosecutor must prove beyond a reasonable doubt that

> the defendant aided or abetted the commission of an offense and that the defendant intended to aid the charged offense, knew the principal intended to commit the charged offense, or, alternatively, *that the charged offense was a natural and probable consequence of the commission of the intended offense.* [*Id.* at 15 (emphasis added).]

Nevertheless, the trial court ultimately instructed the jurors to disregard the word "scope," which necessarily required disregarding the "natural and probable consequence" language. Where both a correct and an incorrect instruction are given, this Court presumes that the jury followed the incorrect instruction. *People v Hess*, 214 Mich App 33, 37; 543 NW2d 332 (1995). Our Supreme Court has cautioned that "[a] change in jury instructions at the eleventh hour . . . should be made only with extreme caution." See *People v Clark*, 453 Mich 572, 589; 556 NW2d 820 (1996). Moreover, it is apparent on the record before us that the jury was confused by the trial court's instructions. The jury asked three times for a clarification of the definition of aiding and abetting.

The trial court's erroneous instructions regarding the aiding and abetting theory under which defendant was charged constitutes error that warrants reversal. The instructions did not "adequately protect defendant's rights by fairly presenting the elements" of the crime for which he was charged. *People v Paxton*, 47 Mich App 144; 209 NW2d 251 (1973). Cf. *People v Martin*, 271 Mich App 280, 352-353; 721 NW2d 815 (2006). The jury operated under the assumption that defendant was guilty of aiding and abetting the armed robbery as long as he knew that Hodges intended to commit *any* crime. This negated the specific intent element that the prosecution needed to prove beyond a reasonable doubt. The jury's reliance on the trial court's instructions, which mischaracterized the applicable law, directly affected the theory presented by defense counsel and resulted in prejudice to the defense. The instructions were contrary to the applicable law, and contrary to the trial court's recitation of the aiding and abetting statute at the plea proceeding. "[W]here the trial court errs in misleading or misinforming counsel regarding the ultimate instructions that will be given to the jury and prejudice results, a new trial is required." *Clark, supra* at 587. We cannot conclude that the erroneous instructions did not affect the jury's verdict. "Because this error affected the jury's result, it is prejudicial error requiring reversal because it affirmatively calls into question the validity of the jury's decision." *Id.* at 591. Defendant is entitled to a new trial.

Because defendant is entitled to a new trial on the basis of the instructional error, with one exception, we decline to address his remaining appellate issues. We shall address defendant's argument that the trial court erred in scoring offense variable ("OV") 1, MCL 777.31, and OV 2, MCL 777.32(1)(d), because the issue is virtually certain to recur if defendant is retried and convicted.

Issues concerning the proper interpretation and application of the statutory sentencing guidelines, MCL 777.11 *et seq.*, are reviewed de novo on appeal. *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006).

In calculating a sentencing guidelines range, the trial court must assess fifteen points under OV 1 if "[a] firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon." MCL 777.31(1)(c). The trial court must assess five points under OV 2 if "[t]he

offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon." MCL 777.32(1)(d).

Defendant argues that the trial court erred in scoring OV 1 and OV 2 because there was no evidence that he possessed or used a weapon in the commission of the robbery. However, "[i]n multiple offender cases, if 1 offender is assessed points for the presence or use of a weapon, all offenders shall be assessed the same number of points." MCL 777.31(2)(b); MCL 777.32(2). Thus, a defendant who is convicted of aiding and abetting an armed robbery is responsible for his codefendant's use of a weapon during the robbery. This is true even where, as here, the defendants are tried separately and sentenced by different judges. See *People v Morson*, 471 Mich 248, 253 n 5; 685 NW2d 203 (2004). Accordingly, if defendant is retried and convicted, the trial court must assess the same number of points under OV 1 and OV 2 that were assessed by the trial court in sentencing Hodges, unless it can be demonstrated that the number of points assessed to Hodges was erroneous or inaccurate. *Id.* at 262; *People v Libbett*, 251 Mich App 353, 367; 650 NW2d 407 (2002).

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Michael R. Smolenski